Merging NEPA and CWA Section 404 Processes

EPA Region 3
June 2015

National Environmental Policy Act of 1969 (NEPA): An Introduction

- *A decision making process. NEPA imposes procedural, not substantive, requirements*
- *Triggered by any major federal action with potential to significantly affect the human environment*
- *Applies only to federal (Executive Branch) actions*
- *Includes the public in government decisions*

Summary of NEPA

Title I, Section 101: Establishes national policy

- *Foster/promote general welfare*
- *Create/maintain conditions under which man and nature can exist in productive harmony*
- *Fulfill social, economic, and other requirements of present/future generations*

42 U.S.C. 4321 et seq.

Summary of NEPA
(continued)

Title I, Section 102: Directs agencies to prepare environmental impact statements (EISs) for major federal actions significantly affecting the environment

- *Environmental impacts of proposed action*
- *Unavoidable adverse impacts of proposal*
- *Alternatives to the proposal*
- *Short-term uses vs. long-term productivity*
- *Irreversible/irretrievable commitments of resources*

42 U.S.C. 4321 et seq.

Summary of NEPA
(continued)

Title II: Established the White House Council on Environmental Quality (CEQ)

- *Oversees implementation of NEPA*
- *Prepares annual Environmental Quality Report*
- *Develops national policies for environmental quality*
- *Conducts analyses/investigation on ecological systems and environmental quality*
- *Documents changes in natural environment*
- *Resolves formal interagency disputes*

42 U.S.C. 4321 et seq.

Three Types of NEPA Documents

- *Categorical Exclusion (CATEX)*
  - *Decision Memorandum*
- *Environmental Assessment (EA)*
  - *Finding of No Significant Impact (FoNSI)*
- *Environmental Impact Statement (EIS)*
  - *Record of Decision (ROD)*

Categorical Exclusion (CATEX)

Categories are established by each federal agency through a formal rulemaking process or are established by congressional action

A category of actions that do not, individually or cumulatively, have significant effects on the environment based on experience with similar actions

Most nationwide §404 permits qualify for CATEXs

40 CFR 1508.4

Environmental Assessment

Environmental Assessment (EA):

- *Provides evidence/analysis for determining whether the action will cause significant impacts (i.e., require an EIS)*
- *Aids compliance with NEPA when no EIS is prepared*
- *Facilitates preparation of an EIS when one is needed*

EAs do not need to be circulated for public review, but should be available to support decision

Most individual § 404 permits are supported by EAs

40 CFR 1508.9

Finding of No Significant Impact

Finding of No Significant Impact (FoNSI) is a decision document supporting a determination that an action will not result in significant impacts

Must include the EA or a summary of it, and commit to mitigation measures needed to reduce impacts below significance threshold

40 CFR 1508.13

What is a Significant Impact?

- Context – significance varies with setting
- Intensity - the degree to which an action involves:
  - *Effects to public health/safety, T&E species, or to scientific, cultural or historic resources*
  - *Effects to unique characteristics of the area*
  - *Effects that are highly controversial*
  - *Effects that are highly scientifically uncertain*
  - *Precedent for future actions*
  - *Relationship to other actions w/ significant cumulative effects*
  - *Potential to violate laws for environmental protection*

40 CFR 1508.27

Environmental Impact Statement

EISs evaluate major federal actions with significant environmental effects

- Scoping: used to identify the impacts that will be evaluated in the EIS
- Draft EIS: evaluate the impacts of the action and reasonable alternatives
- Final EIS & ROD: responds to comments, including any project changes

40 CFR 1502.9

Environmental Impact Statement

Content : An EIS begins with Purpose and Need, and contains assessment of a wide range of issues including current condition and potential impacts to:

natural resources (upland, aquatic, air, noise)
endangered species
drinking water
social and cultural (including historic) resources, community cohesion, Environmental Justice, Children's Health
secondary and cumulative effects on any resource impacted by the project

EA v. EIS

- Large range in styles for EAs; EISs more uniform
- The Corps typically will do an EA for an IP
- An EA can follow many of the same steps as an EIS, but it is not required to be public unless "precedent-setting" project/decision
- Many Lead Federal Agencies (LFA) make all EAs available to public, request public scoping, do robust analysis, etc (Others do not)

EPA Roles in the NEPA Process

- Complies with NEPA, as necessary, for EPA actions
- Receives EISs filed by other federal agencies
- Reviews NEPA documents pursuant to NEPA and Section 309 of the Clean Air Act

EPA Review Responsibilities

- *Under Section 102 of NEPA, all federal agencies and the public <u>can</u> review EISs*
- *Under Section 309 of the Clean Air Act, EPA <u>must</u> review:*
  - *legislation proposed by another federal agency;*
  - *newly authorized federal construction projects and major federal actions (i.e., EISs); and*
  - *regulations proposed by other federal agencies*
- *EPA's comments must be in writing, and publically available*

EPA's EIS Rating System

- *Project:*
  - *LO = Lack of Objections*
  - *EC = Environmental Concerns*
  - *EO = Environmental Objections*
  - *EU = Environmentally Unsatisfactory*
- *Document:*
  - *1 = Adequate EIS*
  - *2 = Insufficient Information*
  - *3 = Inadequate EIS*
- *Adverse ratings (EU & 3) require HQ approval*

Referrals to CEQ

- *Action, at Final EIS, is environmentally unacceptable because of:*
  - *possible violations;*
  - *severity, duration, or geographical scope of impacts;*
  - *availability of environmentally preferable alternative; or*
  - *importance as a precedent*
- *Section 309 of the Clean Air Act expands EPA's referral authority to any matter*
- *Historically, CEQ has not accepted referrals if the referring agency has authority to address the environmentally unsatisfactory issue*

Now that you are NEPA savvy, let's look at merging 404:

- *Discuss some of the challenges*
- *Compare the NEPA and CWA Section 404 (404) processes*
- *Identify intersections between, and opportunities for the integration of NEPA and 404*
- *Discuss some examples*
- *Present an overview of the pros and cons of integrating and aligning the two processes*

Why Merge?

- All Federal action agencies must comply with NEPA. Regulations encourage agencies to cooperate in the preparation of a single EIS.
- Preparation of multiple NEPA documents (e.g., EIS and SEIS) by different agencies for the same project:
  - *Is inefficient, requires extra time and resources*
  - *Likely duplicative*
  - *Alternative selected in NEPA may not be LEDPA if 404 not considered adequately*
  - *Leads to stakeholder frustration*
- *There is no inherent conflict between NEPA and CWA 404. 404 permits require NEPA documentation.*

Integration Challenges

- Need for 404 permit may not be identified early in NEPA process.
- EIS may be "higher level" analysis (eg with linear projects that have several alignment possibilities) and there may be insufficient detail to evaluate compliance with the 404(b)(1) Guidelines until later in time.
- The Corps must still comply with NEPA prior to issuing a 404 permit.

Integration Challenges
(continued)

- Corps focus on aquatic resources, NEPA for most Lead Agencies covers broader issues.
- Getting Lead Federal Agency buy-in: each has its own guidelines and rules for NEPA compliance, different engagement with Corps (eg NRC vs FHWA)

Comparing NEPA and CWA 404

- NEPA dictates process, not outcome
  - EIS/ROD identifies environmental impacts of alternatives, but it does not have to select environmentally preferred
- CWA 404 dictates outcome
  - Only least environmentally damaging practicable alternative (LEDPA) may be authorized by the Corps

Comparing NEPA and CWA 404 Project Purpose & Need (Transportation Example)

- *NEPA-*

  Purpose and Need could be broad:
  Reduce congestion, improve air quality, improve safety.

Comparing NEPA and CWA 404 Project Purpose (Transportation Example)

- *404-*

  Typically narrower project purpose with design elements and transportation corridors.

Project Purpose Leading to Identifying a Range of Alternatives

- Both processes consider project purpose in identifying a range of alternatives
  - *NEPA- Purpose and Need*
  - *404- Overall Purpose*
- Requires a collaborative effort to ensure that both the Lead Federal Agency (LFA) and Corps' requirements are met.

Identifying a Range of Alternatives Under 404 and NEPA

- Both NEPA and 404 require comparing the environmental effects of a *range of alternatives*, not all possible alternatives,
- When considering 404, the range of alternatives in the NEPA document should include *all alternatives* that might be the LEDPA

Identifying a Range of Alternatives (continued)

- *NEPA*: *reasonable* alternatives need be evaluated
- *CWA 404*: *practicable* alternatives need be evaluated
- There will be differences of opinion about whether specific alternatives are reasonable or practicable
- The *practicable* alternatives identified by the Corps are independent of and not constrained by the *reasonable* alternatives identified by LFA, but some or all could be the same
- Under NEPA, *reasonable alternatives* can include those outside the authority of the lead agency (broader).

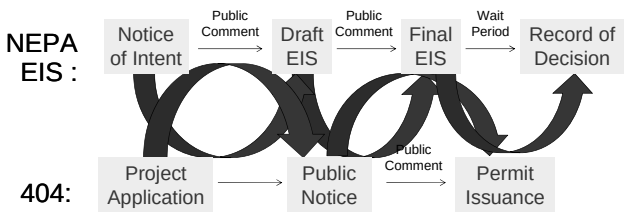
LEDPA v. NEPA Preferred Alternative

- The NEPA LFA identifies the environmentally preferred alternative; they are not required to select it
- The Corps identifies the LEDPA after evaluation of practicable alternatives. The 404(b)(1) Guidelines prohibit permitting any other alternative

NEPA and 404 Process Steps

- EIS process involves the Notice of Intent to Prepare an EIS (scoping period), Draft EIS, Public Meeting/Comments, Final EIS and ROD
- An EA involves: Draft, then Final EA/FONSI (or EIS if needed); with/without public
- 404 Permit Process generally involves Project Application, Public Notice and Permit Issuance
  - *The NEPA process for the LFA should be completed prior to permit issuance*

Integration of NEPA and 404 Processes



Three Examples of Projects Requiring Both NEPA and 404

- Hypothetical Examples-
  - *(1)CWA 404 Follows NEPA (traditional)*
  - *(2)CWA 404 and NEPA are Concurrent (merged)*
  - *(3)A Hybrid Approach (adjustments to make merged work)*

Example Project

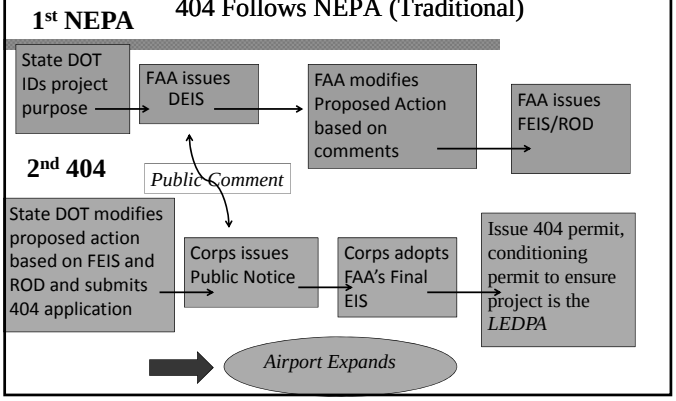
- Example Project: Airport Expansion
- Applicant: State Department of Transportation
- Lead Federal Agency: Federal Aviation Administration (FAA)
- Project requires Corps 404 permit

Example Project (Continued)

- Purpose and Need: Improve airport safety, expand operational conditions, comply with FAA regulations
- Project is non water-dependent, but with specific design and operational constraints on "practicable" alternatives
- State DOT identifies initial proposed action

NEPA/ CWA 404

404 Follows NEPA (Traditional)



Traditional Sequence - Advantages (404 Follows NEPA)

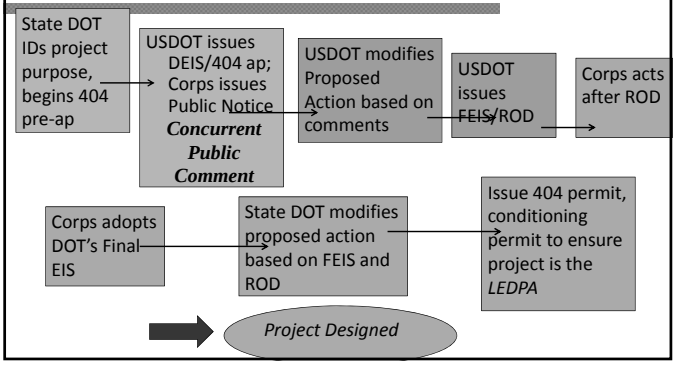
- Alternatives analysis has already been completed during the EIS process.
- Environmental data made available during EIS process informs the 404 review.
- Two opportunities, separated in time, for agencies and public to comment on the proposed project, leads to improvement in determining LEDPA.

Traditional Sequence - Disadvantages (404 Follows NEPA)

- Proposed project may change after FEIS and ROD, necessitating supplemental EIS.
- Project design may be conceptual during EIS review. Risk that engineered design, once available, does not qualify as LEDPA.
- Risk that none of the reasonable alternatives analyzed in EIS may be determined to be the LEDPA under the 404 review that is conducted later on.

NEPA/ CWA 404

NEPA/404 Concurrent Reviews



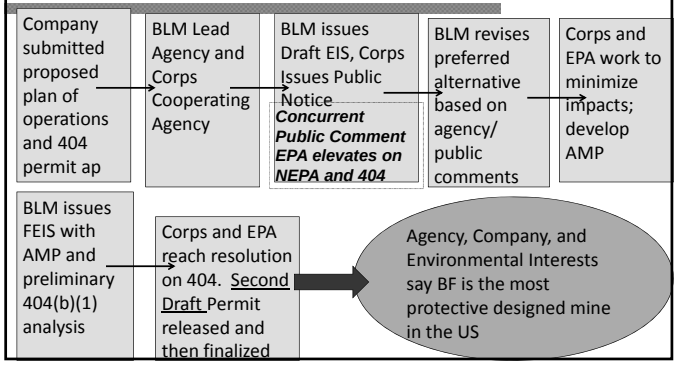
Merged Process - Advantages
(NEPA and 404 Concurrent Reviews)

- Reviewers of both the Draft EIS and the 404 Public Notice are studying the same data.
- The proposed project under Draft EIS review is the same as under 404 Public Notice review.
- Changes can be made to project to address aquatic resources while early in planning phase

Merged Process – Disadvantages
(NEPA and 404 Concurrent Reviews)

- One opportunity to express concerns with the proposed project.
- Alternatives in the Final EIS may still not encompass the LEDPA.
- Detail on appropriate mitigation may not be available (compliant to 2008 Mitigation Rule)
- Changes to the project may be made after DOT considers comments offered during Draft EIS review, possibly requiring the Corps to run a new Public Notice .

Blackfoot Bridge Mine Example



Merged Process Adjustments

- Corps needs to be flexible
  - *Use preliminary JD*
  - *Accept limited assessment on alternatives, until preferred identified in Final EIS*
  - *May go to public hearing without selected alternative*
  - *Corps may issue provisional permit*

Pros and Cons of Integration

- Pros:
  - Awareness of permitting requirements encourages important issues and resources to be evaluated in NEPA document. Increases efficiency.
    - *Example: Consideration of "practicable" screening criteria in development of EIS alternatives*
    - *Prelim JD and functional assessment of aquatic resources evaluated early*
  - EIS alternatives contain LEDPA or near LEDPA
    - *Allows resource avoidance while at planning phase*
    - *Avoid NEPA preferred alternative being unpermitable under 404; eases NEPA study adoption*

Pros and Cons of Integration

- Cons:
  - EIS analysis may not be detailed enough for 404(b)(1) assessment /identification of the LEDPA
  - Mitigation not always secured

Important NEPA Web Pages

- CEQ: http://www.whitehouse.gov/ceq
- CEQ NEPAnet: http://www.nepa.gov
- EPA NEPA Program: http://www.epa.gov/compliance/nepa/index.html

Merged NEPA and 404

Questions?

Thank You for Staying to the End

Contact info: rudnick.rarbara@epa.gov